(2)

FILED

031554 MAY 13 2004

No. 03-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KENNETH PLEDGER, Individually and on Behalf of His Minor Children, DARNELL PLEDGER, ACHEL ROBINSON, KEIRA JOHNSON, IVAN PLEDGER, TORN PLEDGER and JILASEA HENRY; TRIXINE PLEDGER

Petitioners

VERSUS

PHIL GUILBEAU OFFSHORE INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OWEN J. BRADLEY
ATTORNEY FOR PETITIONERS
210 Baronne Street, Suite 1307
New Orleans, Louisiana 70112
Telephone: (504) 523-4122

QUESTION PRESENTED

In this 33:905(b) action under the Longshore and Harbor Workers Compensation Act, the plaintiff, a Halliburton employee, slipped on algae while loading equipment onto a wooden deck of a supply boat owned by the defendant, Phil Guilbeau, Inc. while the vessel was offshore alongside a jack up rig. The case was dismissed on Summary Judgment since there was no violation of the second Scindia duty, (Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed 2d 1 (1981). The Fifth Circuit affirmed.

The questions presented, therefore are:

1. Was the Fifth Circuit in error in affirming the District Judge's grant of Summary Judgment by applying erroneous law contrary to this Court's decision in Scindia, Supra, and law in conflict with the Third and Ninth Circuit decisions,

2. Was the Fifth Circuit in error in not even considering or deciding the question of active involvement under the clear dictates of the second Scindia duty.

PARTIES TO PROCEEDINGS

The parties to this case are the plaintiffs, Kenneth Pledger, his wife Trixine Pledger, and their children. The only remaining respondent is Phil Guilbeau Offshore Inc., the other original defendants having been dismissed from the case. The intervenor is Pacific Employers Insurance (the insurer for Halliburton).

TABLE OF CONTENTS

Page

Question Presented i

Parties to Proceedings and Corporate Disclosure Statement..... ii

Table of Contents iii

Table of Cited Authorities iv

Table of Appendices v

Opinions Below 1

Statement of Jurisdiction 1

Reasons for Granting the Writ 2

Statement of the Case 3

Argument 4

Conclusion 8

TABLE OF CITED AUTHORITIES

Cases: *Page*

Bjaronson v. Botelbo Shipping Corp., 873 F.2d 1204 (1989).....5

Breaux v. United States, 1996 WL 626328 at *4 (E.D. La 1996).....7

Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532(1994).....5

Edmonds v. Compagnie, 443 U.S. 256, 1979 AMC 1167 (1979).....8

Lampkin v. Liberia, 823 F. 2d 1497, 1502 (11th Cir. 1987). See S. Rep. No. 92-1125 (1972).....5

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed 2d 1 (1981).....i, 2, 4, 5, 6, 7, 8

TABLE OF APPENDICES

page

Appendix A – Decision of Fifth Circuit Court of Appeal Entered May 1, 2003.....1a

Appendix B – Judgment of District Court Entered May 5, 2003.....1b

Appendix C – Order & Reasons of District Court Entered May 1, 2003 .....1c

Appendix D – Denial of Petition for Rehearing Entered March 4, 2004.....1d

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's opinion is published at 2003 WL 23 82 (E.D. La. May 01, 2003). It is attached hereto in the appendix as appendix "C". The Court of Appeals opinion is unpublished. It is attached as appendix "A". The petition for rehearing was denied by the Fifth Circuit Court of Appeals on March 4, 2004 (It is attached hereto as appendix "D").

STATEMENT OF JURISDICTION

The original claim against the defendant, Phil Guilbeau, was governed by section 33:905(b) of the Longshore and Harbor Workers Compensation Act. The United States District Court for the Eastern District of Louisiana, the Honorable Judge Eldon E. Fallon, pursuant to Title 28 U.S.C., sec. 636(c) entered a Final Judgment in this matter on May 1, 2003 when he granted Motions for Summary Judgment filed by Phil Guilbeau Offshore, Inc.

Jurisdiction of the Fifth Circuit Court of Appeals was evoked under 28 U.S.C., sec. 636(c)(3) and 28 U.S.C., sec. 1291.

The Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 1254.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal maritime law in conflict with this Honorable Court's decision in Scindia, Supra and in conflict with opinions of the Third and Ninth Circuit Court of Appeal.

STATEMENT OF THE CASE

The facts are fairly stated in the District Court and in the Court of Appeals opinions included in the appendix.

As the Fifth Circuit has stated: "Plaintiff was a member of a three-man Halliburton crew which had completed work on a well from a stationary lift boat. The crew was in the process of loading Halliburton's equipment from the lift boat to the deck of the Defendant's Supply boat. In the process of so doing, Plaintiff slipped in algae growing on the wooden deck of the supply boat, and was injured."(page 2 of Court of Appeals' opinion)

The vessel's function was to "run men and equipment" whenever and wherever Stone Energy Services, the owner of the well, required under its contract.

Guilbeau's captain Austin Darby's involvement was in physically controlling the motion, the attitude and the position of his vessel in relationship to the crane, with his engines and his rudder. As a result of the sea conditions, he was on a continuing basis adjusting the position of the vessel in relationship to the load.

Captain Darby was at the stern controls facing the deck maneuvering the TONY G in the rough

seas and directing the placement of the equipment on his back deck. The Halliburton hands were handling the taglines and signaling the crane operator at times. The Halliburton crew played no part in decisions as to where the equipment would be placed on the deck.

Additionally, as admitted by Captain Darby, it was Guilbeau's responsibility to maintain the deck of the TONY G to prevent the accumulation of algae on the wooden planks of the back deck and to remove algae from the back deck.

ARGUMENT

In Scindia, supra, the second duty in full is set forth as follows:

> ". . . the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a long shoremen or if it fails to exercise due care to avoid exposing long shoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation."

Scindia 451 US 156 at 167 (emphasis added).[1]

The present holding of the Fifth Circuit not only does not follow the dictates of this Honorable court in Scindia, supra, but the decision is in conflict with Third and Ninth Circuit opinions. See the thorough analysis in the leading case on the second Scindia duty in the Third Circuit opinion, Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532 (1994); see also Ninth Circuit Opinion in Bjaronson v. Botelbo Shipping Corp., 873 F.2d 1204 (1989).

In Davis, Supra the Court gave a thorough analysis of the second Scindia duty. In Davis, the

---

[1] The quoted statement is everything the Supreme Court stated on what became known in the jurisprudence as the "second Scindia duty". The decision went into some detail on the other 2 duties which was the real basis of Scindia and why the Supreme Court granted writs. The reasoning of Scindia is obvious and fair. In the typical situation (where grants of summary judgment abound), where the vessel "turns over" the work area to the stevedore, the vessel's liability should be severely limited in fairness. If the vessel remains in control or is "actively involved" in the operation, then this is a completely different situation. There the issues are straight forward and simple: Did the vessel's retention of control or active involvement cause the injury, at least in part. The legislative history from the congressional reports explains why a vessel should be responsible for its own negligence. See discussion in Lampkin v. Liberia, 823 F. 2d 1497, 1502 (11th Cir. 1987).

plaintiff slipped on ice and grease on the deck of the defendant's vessel. The ice had formed because a member of the crew had hosed down the deck, in order to clear it of cement dust.

The Court found:

> "Alternatively, a finding of active control is supported by the testimony indicating that the crew generally remained on the affected portion of the deck during the stevedore's unloading operations and that the crew was responsible for maintaining the deck, evidence which tends to show that the crew never turned exclusive control of the area over to the stevedore but retained substantial control over the area. Here both Davis and Randolph testified that it was customary for the vessel, not the stevedore, to maintain the deck by removing the slippery conditions." (p. 541).

The District Judge and the Fifth Circuit Court of Appeals were in error in finding as a matter of law no violation of the second Scindia duty, principally because they did not apply the appropriate and complete law. As the Fifth Circuit stated: "... for the ship owner to be liable under the second Scindia duty the vessel must exercise active

control over the actual methods and operative details of the longshoreman's work. Breaux v. United States, 1996 WL 626328 at *4 (E.D. La 1996). This record reflects no evidence of such control." (page 3 of Fifth Circuit Opinion)

This is simply not the law and there is no federal appellate court case that has ever held such.

Additionally, the Fifth Circuit and the District Court failed to address the issue of the defendants' "actual involvement" in the work operation.

In Scindia, the Supreme Court stated "... the vessel may be liable if it actively involves itself in the cargo operations ..." (Scindia 45, US 156 at 167.) Neither the district court nor the Fifth Circuit's opinion anywhere discussed the active involvement duty of the vessel as applied to this case. Captain Darby was certainly actively involved in this operation in continuously controlling the motion of the vessel, while at the stern controls, and in directing the placement of the equipment on the deck.

The unfortunate fact of the Fifth Circuit's decision is that it shifts the defendant's responsibility to Halliburton and the plaintiff by finding that the Halliburton employees continued to work in the face of the algae on the deck (page 2 of Court's opinion). Even if Halliburton was 99% negligent, this does not relieve the vessel owner of

its responsibility to furnish a safe deck. See Edmonds v. Compagnie, 443 U.S. 256, 1979 AMC 1167 (1979).

Certainly, before this Court's decision in Scindia, Supra, the defendant would have been responsible for its negligence under the maritime tort doctrine. Nothing in Scindia changes the fact that the vessel is responsible for its own negligence.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

OWEN J. BRADLEY
1307 FNBC Building
210 Baronne Street,
New Orleans, Louisiana 70112
Telephone: (504) 523-4122